86 1495

No. _____

IN THE

Supreme Court of the United States

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased; individually and as personal representative of the Estate of Abenicio Gonzales, deceased; and as guardian of Randall Gonzales, Minor; RICARDO GONZALES; MERLINDA GONZALES; ROSALIND GONZALES, heirs at law of the deceased, and the Estate of Abenicio Gonzales,

Petitioners,

vs.

ROGER SEALY and THE CITY AND COUNTY OF DENVER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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ATTORNEYS FOR PETITIONERS

QUESTION PRESENTED FOR REVIEW

Whether the Tenth Circuit's novel creation of an insurmountable burden of proof in death cases arising under 42 U.S.C. § 1983 inconsistent with the legislative intent, legislative history, and the decisions of this Honorable Court construing § 1983?

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QUESTION PRESENTED FOR REVIEW

Whether the Tenth Circuit's novel creation of an insurmountable burden of proof in death cases arising under 42 U.S.C. § 1983 is consistent with the legislative intent, legislative history, and the decisions of this Honorable Court construing § 1983?

IN THE

SUPREME COURT OF THE UNITED STATES

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased; individually and as personal representative of the Estate of Abenicio Gonzales, deceased; and as guardian of Randall Gonzales, Minor; RICARDO GONZALES; MERLINDA GONZALES; ROSALIND GONZALES, heirs at law of the deceased, and the Estate of Abenicio Gonzales, *Petitioners,*

vs.

ROGER SEALY and THE CITY AND COUNTY OF DENVER, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE 10TH CIRCUIT COURT OF APPEALS

Opinion Below

The opinion of the Tenth Circuit Court of Appeals is set forth in the Appendix, as is the District Court's Summary Judgment Order and Oral Ruling entered in reliance on *Trujillo v. Board of County Commissioners,* 768 F. 2d 1186 (10th Cir. 1985).

Constitutional Provisions and Statutes

U.S. Constitution Amendment XIV: SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983: Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jursidiction thereof to the deprivation of any privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988: The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Statement of the Case

On August 9, 1981, respondent Roger Sealy, while on duty as an officer of the Denver Police Department, repeatedly shot Abenicio Gonzales while Gonzales was drunk and helpless, causing his death. At the time he was brutally killed, Gonzales was married to petitioner Corina Ann Gonzales, and they had four living children: Randall, Ricardo, Merlinda, and Rosalind Gonzales, the remaining petitioners. Petitioners filed suit, seeking damages under 42 U.S.C. § 1983 and state wrongful death statutes.

Petitioners based their claims on their individual associational rights with their husband and father, Abenicio Gonzales. *See Espinoza v. O'Dell,* 633 P.2d 455 (Colo. 1981), *cert. dismissed,* 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982). *See also Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961). In addition, petitioner Corina Ann Gonzales brought claims against defendants as personal representative of Abenicio Gonzales' estate, seeking vindication of decedent's own rights under cases such as *Jackson v. Marsh,* 551 F. Supp. 109 (D. Colo. 1982), and *Sager v. Woodland Park,* 543 F. Supp. 282 (D. Colo. 1982).

The Complaint filed by petitioners, and subsequent amended complaints, alleged, *inter alia,* that defendant Sealy acted willfully, maliciously, and intentionally in causing Abenicio Gonzales' death, and in so doing, deprived the petitioners of their individual associational and familial rights, and decedent of his right to life. Despite clear evidence that Officer Sealy had acted intentionally in shooting Abenicio Gonzales five times, however, the district court granted summary judgment dismissing the individual § 1983 claims, on the basis of *Trujillo v. Board of County Commissioners,* 768 F.2d 1186 (10th Cir. 1985). The Tenth Circuit affirmed, declining to reconsider the *Trujillo* ruling.

In *Trujillo*, the Tenth Circuit held, without reference to legislative history, that it was insufficient to allege just a wrongful and intentional killing, committed under color of state law, to give rise to a § 1983 claim for the survivors. Rather, in *Trujillo*, the court held that, in addition, a showing of an actual intent to interfere with or destroy the familial relationship must be proven even where the shooting itself was clearly intentional.

The *Trujillo* court recognized that "other courts have not imposed any state of mind requirement to find a deprivation of intimate associational rights." That recognition, however, did not prevent the *Trujillo* court from imposing upon § 1983 actions a new, unprecedented, and practically insurmountable element of proof wholly at odds with the legislative history surrounding the enactment of 42 U.S.C. § 1983.

Summary of Argument

The "specific intent" requirement created by the Tenth Circuit in *Trujillo v. Board of County Commissioners,* and reiterated in this case, is wholly inconsistent with the legislative intent in enacting 42 U.S.C. § 1983. 42 U.S.C. § 1983 was enacted to provide a deterring civil remedy to rectify and remedy unlawful acts engaged in by state officials under color and guise of state law. The novel element of proof first propounded in *Trujillo*, which now governs all § 1983 actions filed in the Tenth Circuit, is wholly at odds with the legislative intent and with numerous decisions of this Honorable Court construing § 1983.

In addition, the *Trujillo* decision has created a substantial and significant inconsistency, not only among lower federal courts, but also between the state and federal courts in the State of Colorado, by virtue of the fact that no Colorado state appellate court has adopted any aspect of *Trujillo*. As a consequence, § 1983 litigants within the Tenth Circuit are treated differently than similar persons filing similar claims in other circuits, *see De La Cruz La Chapel v. Chevere Ortiz,*

637 F. Supp. 43 (D. Puerto Rico 1986), and § 1983 plaintiffs in cases filed in federal district court in Colorado are held to proof of an additional element of "specific intent" not required in cases filed in state court. These considerations certainly justify a grant of certiorari in this case. *Compare Daniels v. Williams,* 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Argument

In *Trujillo v. Board of County Commissioners,* the Tenth Circuit held, as no other court has held, that the surviving spouse and children of a person wrongfully killed by the police, who subsequently files a § 1983 suit, must prove not only that the state officer acted intentionally, but must further show that the officer acted with a specific intent to destroy the associational relationships within the family. This holding was unprecedented, insupportable through reference to legislative history, and had the effect of eliminating resort to § 1983 in death cases where the victim and the assailant were not previously acquainted.

The "specific intent" created by the Tenth Circuit in *Trujillo v. Board of County Commissioners* does not comport with the congressional intent in enacting § 1983 and related civil rights statutes. 42 U.S.C. § 1983 and 1988 were enacted as part of the 1866 and 1870 Civil Rights Acts and the Klu Klux Klan Act of 1871. *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). These statutes provided a civil remedy to "the party injured" or "any party so injured or deprived" as a result of deprivation of civil rights under color of state law.

Although neither 42 U.S.C. § 1983 nor § 1988 specifically define who is "injured" when death occurs as the result of official lawlessness, one thing is clear: the Congressional intent was to deter official lawlessness and to compensate the bereaved families of victims of the then-rampant state acts of officially condoned murder. *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). *See also United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Although violence akin to the racist lynchings that followed the Civil War occurs more rarely now, nevertheless the vestiges of racism and outbreaks of police brutality remain, making the civil rights statutes as timely in 1987 as they were in 1866 and 1870.

No one could seriously question that the legislative intent in passing these statutes was to provide effective remedies in death cases, as well as recovery in situations where non-fatal injuries were inflicted. The Congressional purpose for passage of these acts was to provide a "positive punitive civil remedy" rather than compensation

for specific physical or financial injury. Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes,* 45 Tex. L. Rev. 1015, 1026 (1967). § 1983 was intended as a remedial broad remedy designed to protect and defend the populace, intended "not only to provide compensation to the victim of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). *See also Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 n. 6 (1983).

Such modern extrapolation of Congressional intent is borne out by reference to the legislative history. For example, President Grant's message to Congress referred specifically to losses of life which prompted his request for remedial federal legislation. *See Cong. Globe,* 42 Cong., 1st Sess., p. 244. Floor debates on the bill frequently reflected that theme. For example, Senator Lowe of Kansas stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper correction. (*Cong. Globe,* 42d Cong., 1st Sess., p. 374).

Similarly, Congressman Butler stated:

> This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; *to the children whose father has been killed as a remedy.* (Cong. Globe, 42d Cong., 1st Sess., p. 807). (Emphasis supplied).[1]

It is not surprising, therefore, that courts have uniformly held that Congress intended the civil rights acts to apply where the deprivation of constitutional entitlement resulted in death. *See, e.g., Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961), *cert. denied,* 368 921, 82 S.Ct. 243, 7 L.Ed.2d 136; *Hall v. Wooten,* 506 F.2d 564 (6th Cir. 1974); *Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977); *Perkins v.*

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[1] *See also Cong. Globe,* 42d Cong., 1st Sess., p. 321 (protection for life); *Cong. Globe,* 42d Cong., 1st Sess., p. 370 (Act passed in hopes of achieving a civilization "in which every man's house is defended against murder and arson . . ."); *Cong, Globe,* 42d Cong., 1st Sess., p. 428.

Salafia, 338 F. Supp. 1325 (D. Conn. 1972). *See also Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 n. 14 (1973).

> [It] defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.

Brazier v. Cherry, supra. See also Green v. Carlson, 581 F.2d 669 (7th Cir. 1978). Clearly, § 1983 actions are properly brought by family members even when the constitutional deprivation results in the death of the principal victim of violence. Otherwise, the lawless act would go unremedied. As was stated in *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> [W]here federally protected rights have been involved, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to right the wrong done.

See also Green v. Carlson, 581 F.2d 669 (7th Cir. 1978); *Basista v. Weir,* 340 F.2d 74 (3rd Cir. 1965); *Salazar v. Dowd,* 256 F. Supp. 220 (D. Colo. 1966).

There is absolutely no support in the legislative history, or in subsequent case law, for the imposition of an additional element of "specific intent", to show an intent on the part of the wrongdoer not to just wrongfully kill, but in addition, an intention to interfere with or destroy the associational rights of the bereaved survivors of the wrongdoer's violence. As this Court has acknowledged, the elements of a § 1983 claim are proof of the deprivation of a right, privilege, or immunity secured by the United States Constitution, by a person acting under color of state law. *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Section 1983 does not require proof that official actions be "willful" to the extent that the evidence need show a specific intent to knowingly deprive a citizen of a specific constitutional right. Rather, § 1983 "should be read against the background of tort liability that makes a man responsible for the rational consequences of his actions." *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).[2] *See also Bogard v. Cook,* 586 F.2d 399 (5th Cir. 1978).

The obvious consequence of a death-dealing act is to disrupt and destroy familial relationships, and in effectuating the Congressional intent in the passage of § 1983, there is no justification for imposing a need to show a conscious design to disrupt any particular relationship. Rather, the intent needed to show a § 1983 violation in a shooting case is simply the intent to wrongfully shoot, without proper justification.

The fundamental policies sought to be furthered by § 1983 are compensation and deterrence: Compensation for the victims of official wrongdoing, and deterrence of wrongful acts under color of state law. *Robertson v. Wegmann,* 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). In cases involving the intentional and wrongful deprivation of human life by police officers, it is practically impossible to demonstrate that the murderer both knew of the decedent's family and intended to damage those family members, before squeezing the trigger. The intent requirement of *Trujillo* therefore creates an insurmountable hurdle to family-member recovery under § 1983, in obvious conflict with the Congressional intent.

The decision in this case and in *Trujillo v. Board of County Commissioners,* if permitted to stand, will, in practice, preclude § 1983 recovery for families whose members are wrongfully killed by state officials. In many instances, the victims of such shootings and the perpetrator were not acquainted, making it impossible to show that the wrongdoer acted with the intent of injuring the murdered person's family. The imposition of a "specific intent" to disrupt the family unit, as created by the Tenth Circuit in *Trujillo v. Board of County Commissioners,* is entirely inconsistent with the purposes sought to be furthered by 42 U.S.C. § 1983.

[2]This aspect of *Monroe v. Pape* was unaffected by the subsequent decision of *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which in fact expanded the scope of § 1983 liability to include municipalities.

As this Court has often stated, it is clear that the ultimate law applied in § 1983 actions "is a federal rule responsive to the need whenever a federal right is impaired." *See, e.g., Robertson v. Wegmann, supra.* The express purpose of § 1983 is to make available redress which will effectuate the broad policies of the federal civil rights statutes. *See Brazier v. Cherry, supra.* Since these broad policies include "a clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights . . . ," *see Brazier v. Cherry, supra,* a rule of law which shelters or indemnifies an official wrongdoer from liability is inconsistent with the purposes of the enactment.

What is necessary is "a federal rule responsive to the need whenever a federal right is impaired." *Sullivan v. Little Hunting Park,* 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1979). To impose on the survivors of a murdered citizen the requirement that they prove that a police officer, in addition to acting wrongfully under color of state law, also intended to injure them personally, is to confuse the proper elements of a § 1983 action with the resultant damages. In this case, Roger Sealy wrongfully shot and killed Abenicio Gonzales, acting with malicious intent, and that is intent enough to give rise to liability of the surviving family members for the damages wrought upon them.

Respectfully submitted,

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& Miranda, P.C.
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Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States
Court of Appeals
Tenth Circuit

DEC 24, 1986

ROBERT L. HOECKER
Clerk

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased; individually and as personal representative of the Estate of Abenicio Gonzales, deceased; and as guardian of Randall Gonzales, Minor; RICARDO GONZALES; MERLINDA GONZALES; ROSALIND GONZALES, heirs at law of the deceased, and the Estate of Abenicio Gonzales,

Plaintiff-Appellants,

v.

ROGER SEALY; CITY AND COUNTY OF DENVER,

Defendants-Appellees.

No. 86-1939
(D.C. No. 82-Z-194)
(D. Colo.)

ORDER AND JUDGMENT

Before LOGAN and MOORE, Circuit Judges, and ROGERS, District Judge.*

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*The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

The plaintiffs appeal from an order of the United States District Court for the District of Colorado, dismissing their 42 U.S.C. § 1983 claims that were based on the constitutional right to intimate association. The defendants have filed a motion to affirm the judgment of the district court.

APPENDIX A

The district court relied on Trujillo v. Board of County Commissioners of Santa Fe County, 768 F.2d 1186 (10th Cir. 1985), to dismiss the plaintiffs' section 1983 claims. The plaintiffs concede that *Trujillo*, if properly decided, supports the district court's judgment in this case. They contend, however, that *Trujillo* was wrongly decided and is inconsistent with prior United States Supreme Court decisions.

We decline to reevaluate our recent decision in *Trujillo*, and we conclude that that case supports dismissal of the plaintiffs' section 1983 claims.

The judgment of the United States District Court for the District of Colorado is AFFIRMED. *See* 10th Cir. R. 17(b).

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action N. 82-Z-194

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased, individually and as personal representative of the estate of Abenicio Gonzales, deceased, and as guardian of Randall Gonzales, minor; RICARDO GONZALES, MERLINDA GONZALES; ROSALIND GONZALES; and RONALD GONZALES, heirs at law of the deceased; and the ESTATE OF ABENICIO GONZALES,

Plaintiffs,

v.

ROGER SEALY and the CITY AND COUNTY OF DENVER,

Defendants.

FILED
UNITED STATES
DISTRICT COURT
DENVER, COLORADO

JUN 18, 1986

JAMES R. MANSPEAKER
CLERK

BY _____
DEP. CLERK

ORDER

This case was before the Court on May 23, 1986, for oral argument on Defendants' Motion to Bifurcate Trial, Defendants' Supplement to Motion to Bifurcate, Defendant City and County of Denver's Motion for Summary Judgment and Defendant Roger Sealy's Motion for Partial Summary Judgment. The Court heard arguments and statements of counsel, and made oral findings of fact and conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Defendants' Motion to Bifurcate Trial is denied. It is

FURTHER ORDERED that Defendant City and County of Denver's Motion Summary Judgment and Defendant Roger Sealy's Motion for Partial Summary Judgment is granted. It is

FURTHER ORDERED that the wrongful death claims against the City and County of Denver in claims one and two of the Complaint and the 42 U.S.C. § 1983 claims based on the right of intimate association found in claims three, four, five and seven of the Complaint are dismissed with prejudice. It is

FURTHER ORDERED that, as to the 42 U.S.C. § 1983 claims based on the right of intimate association, the Court's ruling is a final judgment and the decision may be appealed. It is

FURTHER ORDERED that the Court finds that there is no just reason for delay and the Clerk shall enter judgment in favor of defendants and against plaintiffs for dismissal of 42 U.S.C. § 1983 claims based on the right of intimate association. It is

FURTHER ORDERED that the case shall go forward on the wrongful death claim against defendant Roger Sealy in claim one and the decedent's claim under 42 U.S.C. § 1983 in claim six.

DATED at Denver, this 18th day of June, 1986, nune protune May 23, 1986.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action N. 82-Z-194

CORINA ANN GONZALES, et al.,

Plaintiffs,

vs.

ROGER SEALY, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Excerpt of Hearing on Motions: Colloquy and Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:30 a.m., on the 23d day of May, 1986, in Courtroom C-204, United States Courthouse, Denver, Colorado.

RULING

THE COURT: Based on the arguments that I've heard by counsel and some discussion off the record, the Court will rule as follows at this time . . .

As to the 1983 claims against both Sealy and the City, counsel for plaintiff has been unable to show by offer of proof or otherwise that there is going to be that — that he is going to be able to show the necessary *Trujillo* intent. When I'm saying "*Trujillo* intent," I'm referring to the case of *Trujillo v. Board of County Commissioners,* 758 F.2d 1186, a recent 1985 Tenth Circuit case which requires that plaintiffs must show that a defendant intended to deprive a plaintiff of their relationship, the intimate association relationship, and that the intent must be directed to the relationship itself. And without that showing, the motion for summary judgment will be granted and the 1983 claims at this point will be dismissed.

And the Court, becasue I understand the parties want to raise this issue on appeal both with the Tenth Circuit and perhaps the U.S. Supreme Court, will find at this time that as to the 1983 claims which are a separate claim against both defendants, there is no just reason for delay in entering a judgment of dismissal on these claims. And the Court specifically will enter a judgment of dismissal as to the 1983 claims against both defendants only. That matter then may be taken up on appeal whenever Plaintiff thinks proper.

MR. HALABY: As a clarification, does that apply to the 1983 survival action of the estate?

THE COURT: Thank you for asking me to clarify that. It does not apply to the 1983 survival action, but the Court still will stand by its previous ruling on that narrow claim. It applies only to the 1983 claim by the relatives of the deceased.

Anything else we need to do on the record?

MR. ROBINSON: Your Honor, just for the record, if I may comment, because I can't recall what was said on the record and what discussions were had informally, I don't want the record to reflect that specifically that I stated that — well, I want the record to reflect that what I stated was that we have no direct evidence that we can show that Mr. Sealy intended to deprive the family members. I'm not conceding that there isn't circumstantial evidence from which a jury might conclude that; but the showing before the Court based on summary judgment, of course, the Court really isn't in a position to consider that.

THE COURT: It's really difficult for me to see how you would show it circumstantially unless the man knew Gonzales before he knew he had a wife and kids.

MR. ROBINSON: I don't want to have the record with the impression that I conceded *Trujillo* mandates summary judgment. My argument is based more on our absence of specific evidence, direct evidence that Officer Sealy intended to deprive the family members of their husband and father.

THE COURT: Is there going to be any evidence that Sealy knew Gonzales or his wife or his kids before this shooting?

MR. ROBINSON: None to my understanding; and I certainly would state that and concede that for the record.

No. 86-1495 (2)

IN THE

Supreme Court of the United States

October Term, 1986

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased; individually and as personal representative of the Estate of Abenicio Gonzales, deceased; and as guardian of Randall Gonzales, Minor; RICARDO GONZALES; MERLINDA GONZALES; ROSALIND GONZALES, heirs at law of the deceased, and the Estate of Abenicio Gonzales,

Petitioners,

v.

ROGER SEALY and THE CITY AND COUNTY OF DENVER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT

THEODORE S. HALABY
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QUESTIONS PRESENTED

1. Whether a person possesses a constitutionally protected right to a continuing relationship with his parent or spouse.

2. Assuming *arguendo* that such a constitutional right exists, whether a surviving family member states a claim pursuant to 42 U.S.C. § 1983 for deprivation of such right without alleging that the state actor intended to interfere with that particular relationship in causing the death of the family member.

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IN THE

Supreme Court of the United States

October Term, 1986

CORINA ANN GONZALES, individually and as spouse of Abenicio Gonzales, deceased; individually and as personal representative of the Estate of Abenicio Gonzales, deceased; and as guardian of Randall Gonzales, Minor; RICARDO GONZALES; MERLINDA GONZALES; ROSALIND GONZALES, heirs at law of the deceased, and the Estate of Abenicio Gonzales,

Petitioners,

v.

ROGER SEALY and THE CITY AND COUNTY OF DENVER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents concur that a writ of certiorari should issue, but on different grounds.

COUNTER-STATEMENT OF THE CASE

On August 9, 1981, Respondent Roger Sealy, while on routine patrol as an officer of the Denver, Colorado, Police Department, encountered the decedent, Abenicio Gonzales, after observing the vehicle in which Gonzales occupied the driver's seat parked outside a bar with its lights on after the bar had closed. When Officer Sealy ordered Gonzales to step out of the car and to produce identification, Gonzales exited his vehicle, reached to his rear, pulled a knife out of his rear

pocket and lunged at Officer Sealy who was standing approximately five feet away. Officer Sealy drew his service revolver and fired five times, killing Gonzales.

The deceased's surviving wife and four children each brought, *inter alia*, personal claims pursuant to 42 U.S.C. § 1983 contending that the shooting of the decedent deprived each of them of his or her own constitutionally protected right to a continuing relationship with the deceased. The district court granted Respondents' motion for summary judgment and dismissed such claims. The trial court held that based upon the admission of Petitioners that there was no evidence that Officer Sealy knew the decedent or Petitioners prior to his encounter with the decedent, Petitioners would be unable to meet their burden under *Trujillo v. Board of County Commissioners*, 768 F. 2d 1186 (10th Cir. 1985), that would have required proof that Officer Sealy in shooting the decedent did so with the intent to deprive Petitioners of their particular relationship with the decedent.

The trial court certified this issue for appeal pursuant to 28 U.S.C. § 1292 (b). Petitioners appealed the dismissal to the Tenth Circuit. Respondents filed a motion to affirm the judgment of the district court. Petitioners conceded that dismissal was proper under *Trujillo*, if *Trujillo* was properly decided. The Tenth Circuit granted the motion to affirm, declining to reevaluate its decision in *Trujillo*.

SUMMARY OF ARGUMENT

While the Tenth Circuit properly affirmed the dismissal of Petitioners' Section 1983 claims, to the degree *Trujillo* recognized a constitutional right to a continuing family relationship, its reliance on *Trujillo* was misplaced. There is a split among the federal circuit courts and state courts concerning whether a constitutional right to a continuing relationship exists. This Court has not addressed this issue to date. Four circuits have recognized some form of a constitutionally protected right to a family association, one of which held it exists for some family members but not for others. Another circuit and two state courts have held that no such right exists, which is the proper ruling. In the alternative, if such a constitutionally protected right is recognized, a Section 1983 claim premised on deprivation of such right must have logical and reasonable limitations as set forth in the Tenth Circuit's decision in *Trujillo*.

ARGUMENT

Review By This Court Is Required To Resolve A Conflict Among The Federal Circuit Courts And State Courts With Respect To Important And Recurring Federal Issues That Can Only Be Resolved By This Court.

This Court has never considered whether a family member has a constitutionally protected liberty interest in a continuing relationship with another family member. On two prior occasions where this Court did grant review, in *Jones v. Hildebrandt*, 191 Colo. 1, 550 P. 2d 339 (Colo. 1976), *cert. dismissed*, 432 U.S. 183 (1977); and *Espinoza v. O'Dell*, 633 P. 2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982), certiorari was dismissed after oral argument. In *Jones*, the petition was dismissed as improvidently granted, over a strong dissent by Justice White who was joined by Justices Brennan and Marshall, on the grounds of an apparent shift of strategy by plaintiff's counsel during oral argument with respect to an issue this Court concluded had not been directly addressed below. In *O'Dell*, this Court dismissed for want of jurisdiction because the state supreme court had remanded the case for trial, and therefore its decision was not "final." The absence of a decision from this Court on this issue has resulted in a split among the federal circuit courts and state courts regarding whether such a constitutional right exists and, if so, as to which family members. In addition, the courts have not agreed as to whether an allegation that the defendant intended to interfere with a particular relation is required.

The following circuit courts have held such a right to exist, although they differ as to the scope of such right: the Third Circuit in *Estate of Bailey v. County of York*, 768 F. 2d 503 (3d Cir. 1985), *cert. den. sub. nom. Estate of Gilmore v. Buckley*, _____ U.S. _____, 107 S. Ct. 270 (1986), recognized a parent's liberty interest in a continuing relationship with his child; the Seventh Circuit in *Bell v. City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984), recognized a parent's liberty interest in the continued association with his children, but found that no such associational right existed for siblings; the Ninth Circuit in *Smith v. City of Fontana*, 807 F. 2d 796 (9th Cir. 1987), recognized a child's liberty interest in a continuing relationship with his parent; the Ninth Circuit in *Kelson v. City of Springfield*, 767 F. 2d 651 (9th Cir. 1985), recognized a parent's constitutional

right to the continued relationship with his child; and the Tenth Circuit in *Trujillo v. Board of County Commissioners*, 768 F. 2d 1186 (10th Cir. 1985), held that both a parent and a sibling have a constitutional right of freedom of intimate association with the family member, but required proof that the officer acted with the intent to interfere with that particular relationship.

In conflict with these decisions is the First Circuit in *Ortiz v. Burgos*, 807 F. 2d 6 (1st Cir. 1986), which held that parents and siblings do not have a constitutionally protected liberty interest in the companionship of their adult son and brother. *See also Ealey v. City of Detroit*, 144 Mich.App. 324,375 N.W.2d 435 (1985), *cert. den.*, _____ U.S. _____, 107 S. Ct. 401 (1986), holding that parents were deprived of no substantive civil right by the death of their child; and *Ascani v. Hughes*, 470 So. 2d 207 (La.App.), *writ den.* 472 So.2d 919, *cert. den.*, _____ U.S. _____, 106 S. Ct. 517 (1985), holding that siblings have no First Amendment constitutionally protected liberty interest in the continued relationship with a brother.

It is clear that these issues, if left unresolved by this Court, will remain important and recurring ones for both federal and state courts throughout the country resulting in continuing conflicting decisions in such courts.

CONCLUSION

For these reasons, Respondents join Petitioners in urging that a writ of certiorari be issued.

Respectively submitted,

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